IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

## No. 70-78

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, ET AL.,

*Petitioners,*

—v.—

UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## PETITION FOR REHEARING

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ASSOCIATED UTE CITIZENS OF THE STATE OF UTAH, ET AL.,

*Petitioners,*

—v.—

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## PETITION FOR REHEARING

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Petitioners AUC and Reyos jointly petition for rehearing on the decision on the merits dated April 24, 1972, as to questions left open by the opinion and which the Court should either resolve or permit the District Court to examine on remand, and as to apparent inconsistencies in the AUC portion of the case.

## I

## THE IMPACT OF THE DECISION ON THIS NATION'S OBLIGATIONS TO INDIANS AND THEIR LANDS SHOULD BE RECONSIDERED

Petitioners respectfully request rehearing on those aspects of the case dealing with the identity of the "authorized representative." These portions of the opinion reflect fundamental mistakes of law and fact which, if not corrected, may impair the rights of all Native Americans in matters extending far beyond the issues of this case. This Court, as so often in the past, represents the last hope that these first Americans have to require that this country's commitments to them be honored. Surely such a matter is of sufficient importance to justify rehearing.

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*We must seek to demonstrate to them that society is responsive to their patient pleas and help them to live among us in prosperity, dignity and honor.*

—PRESIDENT RICHARD M. NIXON*

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In response to the dilemma posed by the Petition of whether BIA can alter the termination procedures prescribed in acts of Congress, the opinion replies that because "section 6 of the Act, 25 U.S.C. §677e, authorized the mixed-bloods to organize, to adopt a constitution and by laws, and to provide, by that constitution, for the selection of authorized represenatives," and because the Constitution thus adopted

*From an address to the National Congress of American Indians, Omaha, Nebraska, 1968, quoted at COMMONWEAL, 4 Sept., 1970, at 432.

provided that a "quorum" shall consist of twenty-five voters (E. 161), the requirements of Section 6, 25 U.S.C. §677e, of "a majority vote of the adult mixed-blood members at a special election authorized and called by the Secretary" for the valid formation of a common organization were superseded. The opinion thus answers Petitioners protest against high handed bureaucratic action (See Reply Brief for Petitioners, pages 8-11) with the suggestion that if *some* of the Indians (who the Act contemplated were of limited ability at best) concurred, a disregard of the Act's requirements may be sanctioned. If Congress' specification of a "majority" of the 490 persons who were adults may be thus changed to 25, what limits to such arbitrary rewriting of Congressional mandates are then permissible? May BIA, or an officious Indian leader (or in this case, the tribal attorney), substitute the judgment of a single person, or perhaps eliminate any referendum at all?

It is unthinkable – literally – that these unlettered terminated Utes could conceptualize the fine spun reasoning which the opinion has advanced to justify substitution of the clear mandate of the Act. The opinion effectively means that persons who are legally wards of the state may be *estopped* to assert their rights under an act of Congress, which surely introduces a new and dangerous rubric into the law.

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*I am an Indian and am looked on by the whites as a foolish man; but it must be because I follow the advice of the white man.*

—SHUNKA WITKO (FOOL DOG)*

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Alternatively, the opinion proposes that because the AUC Constitution in Article V, §1(b) empowered the board of

*Quoted at BROWN, BURY MY HEART AT WOUNDED KNEE 274 (1970).

directors to delegate "to corporations organized in accordance with the Act" powers necessary to accomplish their purposes, and because AUC adopted Resolution 59-8 purporting to delegate the powers of Article V, §1, paragraph (b), UDC is therefore the "authorized representative" (Op. 4). This analysis ignores that (1) UDC was not "organized in accordance with the Act" as the opinion assumes. The only corporations authorized by the Act were those "for the grazing of livestock, [and] handling of water and water rights." (See 25 U.S.C. § 677*l* (3) and Reply Brief for Petitioners 23-24). The analysis also ignores that (2) the authorized representative power was contained in paragraph (a) of the section rather than paragraph (b) (See Reply Brief for Petitioners 29-30), and was therefore not delegated.

What the opinion does not dispose of, which is relevant to the Court's conclusion, is whether it is fair or reasonable for the terminated Utes to be thus charged with the loss of their heritage. They did not author the disputed resolution or conceptualize the effect this Court has now attached to it. They merely executed documents presented to them by the tribal attorney, who was also installed as their attorney by BIA. The appearance of that same attorney herein, in opposition to the vital interests of his former clients and in disregard of his solemn covenant with them that he would not do so (See Reply Brief for Petitioners, 14 at note 14), is a circumstance which should bear heavily on whether the terminated Utes may be charged by his acts with the presumption that they intended to abandon Congress' safeguards.

In this connection, Petitioners point in requesting that they be referred to as "terminated Utes" was evidently not well communicated (see Op. 2, at footnote 3). To put the matter more bluntly, the use of such a term by the draftsman of the Act, with its obvious racial overtones, is but symptomatic of the calculated disregard of the terminated Ute's

rights in every step of the termination program, including the formation of UDC. The author of that slur was the tribal attorney. Though the Act was adopted by Congress, whose intent must control its doubtful provisions, it was the tribal attorney who was its author. He – not BIA – authored the deviation from the plan Congress sanctioned, when he formed UDC. It was he who purported to serve as legal counsel to *both* sides in the partition of a veritable fortune. *Cf. Luke* 16:13. May such important rights, perhaps, with the entire course of Indian history hanging in the balance, be treated so casually? Should the questionable practices of one mere man not only be given the force of positive law, but be construed in the manner most prejudicial to the interest of the clients he supposedly served? General moral concepts – as well as the ABA Code of Professional Conduct – should preclude such a result.

In holding the terminated Utes strictly accountable for (1) this "resolution adopted with a 42-5 vote," or (2) the adoption of Resolution 59-8 by the vote of 5 Indians, notwithstanding the Act's requirements of a majority vote of adults, the Court has failed to recognize the implication of the Acts promise that the Secretary would approve their "choice of counsel and fixing of fees," 25 U.S.C. §677f. That promise undoubtedly engendered confidence in the terminated Utes that the attorney thus selected for them would *faithfully* apply the safeguards written into the Act.

These matters were given too little attention in the opinion. Particularly in conjunction with the persons of limited abilities being forced to rely on counsel having such a conflict, they present matters warranting inquiry on rehearing.

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*They made us many promises, more than I can remember, but they never kept but one; they promised to take our land, and they took it.*

—MAPHIUA LUTA (RED CLOUD).*

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*Quoted at BROWN, BURY MY HEART AT WOUNDED KNEE 448 (1970).

What the terminated Utes *could* understand was the constantly repeated promise of the Act that the Secretary would see that everything was done properly; by protecting the rights of members "in need of assistance," 25 U.S.C. §677u; by assisting them "in preparing for termination," 25 U.S.C. §677; by proceeding in the manner he deemed in their best interest, 25 U.S.C. §677aa; by providing them with assistance on request and approving their plan for distribution of assets, 25 U.S.C. §677i; by approving trustees and the terms and conditions of trust, 25 U.S.C. §677*l*(4); and certifying that changes in their status were not detrimental, 25 U.S.C. §677c. These Indians had been nurtured on a system in which the Government supervised their every deed, and such promises led them to believe that it would continue to do so in at least these particulars. The failure of the opinion to recognize and implement these promises, and others which appear in the legislative history, should be reconsidered. If they are not, the entire Indian community may have its confidence shattered. Once more, Indian rights will be unsettled. Once more, serious questions will be raised about whether the Government may be trusted where Indian rights are concerned.

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*Sapaniese Cuch stated . . . that land was eternal and belonged to a person even though dead, that it was part of their birthright, the same as they passed on their own blood to their children; that the land was theirs, and that . . . they should not be disturbed in what little they had left.*

—MINUTES OF A MEETING OF THE WHITE ROCKS COMMUNITY OF UTE INDIANS, March 14, 1945

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The Indian's land base is of importance to him far beyond its mere economic value. To the Indian, land is a way of life,

his religion, the stuff of which Indian culture is made. Congress, and President Nixon, have recognized these facts, and made them a part of our national policy, such as in the return of 48,000 acres of valuable forest lands and the sacred Blue Lakes to the Taos Pueblo's in December 1970 with the declaration that "this will mark one of those periods . . . that we started on a new road which led us to justice in the treatment of those who were the first Americans . . ." Washington Post, Dec. 16, 1970 at 27, col. 1.

The implicit assumption of the opinion that these Indians, or any Indians, knowingly and intentionally surrendered control of their lands to a corporation now owned by non-Indians, or that they understood that their stock sales would have that effect, is a conclusion at odds with the President's "new road" policy and one which should be re-examined.

The implications are devastating. The terminated Utes have litigation pending in the Court of Claims seeking compensation for their lost hunting and fishing, timber and water rights. See *Affiliated Ute Citizens v. United States*, No. 156-69 (United States Court of Claims). The Menominee, and perhaps other Indian groups, have similar claims pending. Shall it be *assumed* that they voluntarily surrendered their rights, with no hearing on the merits at all? That could well be the effect of the opinion, and the end of the President's new road of justice.

There may be a temptation for those of us who are the product of a culture which emphasizes personal property values to view the spectre of chaos in Reservation oil and gas leasing suggested by the tribal attorney (Defendent Intervenors Br. 3) as an impediment to recognition of the aspirations of the terminated Utes which spring from their own culture. Undesirable consequences for the Reservation land policies if AUC's rights as authorized representative are

recognized could occur *only* if one assumes bad faith on the part of AUC. There is no foundation for such an assumption. But what of the consequences for the remainder of this nation's Indian citizens if we do not hazard that risk? Is this nation not big enough to recognize these rights? Shall the cultural values of this small group be sacrificed to massive oil interests?

Even if there could be some basis in the Record for assuming bad faith on the part of the terminated Utes, this Court is not powerless to devise appropriate relief. A *prospective* recognition of AUC's rights, limited as to its retroactive effect, would avoid the fears contrived in the tribal attorney's brief, yet do substantial justice to the Indian petitioners.

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*—an interest in people, rather than things; a strong sense of community; a need to share our lives with others; a dignity in harsh surroundings; a sympathetic, non-exploitive love for nature; and taking the measure of a man not by what he has, or looks like, or says, but by what he is.*
*You and I know these things. But too many other Americans do not.*

—SENATOR EDWARD M. KENNEDY*

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AUC does not propose a mere reargument of that which has now been rejected. What is requested is an inquiry into the unique nature of the Indian personality as it bears upon the issues of this case. Such an inquiry, which was impossible within the scope of legal briefs on the merits, will demonstrate that even if the purport of the disputed resolutions was as the

*From an address to the National Congress of American Indians, Albuquerque, New Mexico, October 7, 1969.

Court has concluded, they should nevertheless not be read quite so literally. That is so because Indian customs do not admit of such a rigid reading, in which importance is attached to particular words such as the opinion attaches to the term "powers . . . necessary or desirable in the accomplishment of the objects and purposes for which said corporations may be organized" (Op. 4). Surely the meaning of these acts in the eyes of the Indian is a fundamentally important inquiry. Such inquiry is possible now that the scope of the issues has been reduced.

The query of Mr. Justice Marshall at oral arguments as to just how long we must continue to protect our Indian brothers was most appropriate. Time was not available to respond adequately. The answer, which we propose to supply on rehearing, lies in the distinct culture of the Indian, with its emphasis on non-exploitive sharing of lives and things.

If a compulsory cultural change is the answer, which is simultaneously the basic assumption and fundamental weakness of termination, such change cannot be wrought in this generation. This generation of Native Americans was nurtured on bureaucratic paternalism. Such persons should not be presumed to have intended more than Congress prescribed. The inquiry which AUC proposes will reveal that they relied, as they had a right to do, on their belief that Congress' devices for their protection would be respected. This Court should require that their natural expectations be honored.

## II

## FICTITIOUS AFFIDAVITS SHOULD NOT BE USED AS A BASIS FOR OFFSETS

This Court has failed to comment upon the inconsistency of declaring the "affidavits" which the terminated Utes were

required to sign as sham, yet charging the Indian with the recitations of these same affidavits for the purpose of computing damages. This Court has now held that "adequately supported by the record," was the fact that:

> Some of the affidavits do not accurately describe the sales to which they relate. Although they recite that the sales were for cash, some sellers actually received second hand automobiles or other tangible property. (Op. 15).

The opinion is silent, however, concerning the practice of the trial court in accepting these "affidavits" as an offset against the $1500 per share damages awarded. Thus Leonard Richard Burson was awarded $9,969.07 for his lost heritage (A. 575), representing $15,000.00 for ten UDC shares less $30.93 previously recovered (A. 531) and $5,000.00 recited in his "affidavit" (A. 491). In fact, he only got $3,200 and a used car.

Two injustices are evident in that practice.

First, in a case in which the avowed purpose is to settle rights of terminated Indians, the traditional burden of proof has been reversed to the extent that it is *presumed* that the used car was of the value recited in the affidavit. The usual rule is "that if the fact is one that is required to be 'affirmatively' pleaded by the defendant he will ordinarily have the burden of persuasion . . ." See McCormick on Evidence 673-74 (1954). Therefore, if the used car was of equal value to the stipulated cash, and if it can be considered a substitute for the cash which the offer required, the *defendant* must prove that fact. *Cf. Cumberland Glass Manufacturing Co. v. De-Witt Co.*, 237 U.S. 447, 455-56 (1914).

Second, as was indicated at page 38 of the Brief for Petitioners, the used cars should not be allowed as offsets in any event because this Court has consistently said that if a purchase

of restricted property (this Court acknowledges that the underlying assets are restricted at Op. 4) is made in violation of prescribed procedures the sale may be set aside and the Indian need not make restitution. *See Heckman v. United States*, 224 U.S. 413, 446-447 (1912).

> The effectivenes of the acts of Congress concerning the Indian's thriftlessness is not thus to be destroyed. The restrictions were set forth in public laws, and were matters of general knowledge. Those who dealt with the Indians contrary to these provisions are not entitled to insist that . . . the purchase price [be] repaid, and thus frustrate the policy of the statute.

*See also United States v. Trinidad Coal and Coking Co.*, 137 U.S. 160 (1890). In *Bacher v. Patencio*, 232 F. Supp. 939, 941 (S.D. Cal. 1964) *aff'd per curiam* 368 F. 2d 1010 (9th Cir. 1966) the matter was put in a perspective appropos this case when it was observed that:

> [T]his result may be harsh to the [defendants] but as Justice Holmes once said, people must turn square corners when they deal with their government. They must do the same when dealing with their government's wards.

This case is not in form one for restitution, but the damages awarded are calculated to be in lieu of restitution. The same rules should, therefore, apply.

From a purely practical standpoint, the trouble with this holding is that even though this Court has condemned these "affidavits," it has given them effect by recognizing them as an offset. This Court should reconsider this aspect of its opinion because, in a decision avowedly to resolve important issues "for Indians whose federal supervision is in the course of termination" (Op. 9), failure to strike these offsets based

upon violations of the offering procedure, or at a bare minimum require the *defendants* to prove the reasonableness of the consideration they recite, amounts to an abrupt change in Indian policy. The Indian will have no assurance of fair dealing if this Court permits such practices to stand.

## III

## DAMAGES SHOULD INCLUDE INTEREST

The opinion leaves open the question of whether damages should include pre-judgment interest. It is probable that such an award is within the scope of the remand for further proceedings which has been ordered, but the manner in which the opinion leaves the question unsettled is undesirable.

The law in the Court of Appeals for the Tenth Circuit, as it has developed subsequent to the date when the terminated Utes' cases were tried, includes the award of pre-judgment interest as an element of the "fair value of what [the plaintiff] would have received had there been no fraudulent conduct" which this Court has announced as the measure of damages. *Esplin v, Hirschi*, 402 F. 2d 94 (10th Cir. 1968) *cert. denied* 394 U.S. 928 (1969); *Mitchell v. Texas Gulf Sulphur Co.*, 446 F. 2d 90 (10th Cir. 1971) *cert. denied* 40 U.S. Law Week 3288 (U.S., Dec. 20, 1971) *rehearing on petition denied*, 40 U.S. Law Week 3352 (U.S., Jan. 24, 1972), *cert. denied* 40 U.S. Law Week 3399 (U.S., Feb. 22, 1972); *Financial Industrial Fund, Inc. v. McDonnell Douglas Corp.*, CCH FED. SEC. L. REP. ¶92,811 (D. Colo. 1970). Fairness to these Indian plaintiffs dictates that they at least be awarded a damage measure equal to that of the sophisticated non-Indian investors who were the plaintiffs in *Mitchell*.

The importance of recognizing pre-judgment interest as an element of damage is dramatically apparent in light of the "bellwether" procedures which have been employed. Of the

85 plaintiffs, only 12 have their claims reduced to judgment. These 12 have been accruing interest on their judgment while the remaining 73 who, because of the "luck of the draw," have not had judgment entered in their behalf face the threat of losing the award of any interest, not because they were less diligent than their brothers, but because the defendants First Security Bank and its officers have pursued their appeal. That, perforce, is the basis for the award of pre-judgment interest. The innovative "bellwether" procedures invoked by the trial judge were intended to streamline procedure, not to supply an avenue for the bank and its officers to further victimize the terminated Utes with years of appellate delay. It goes without saying that a broker of credit such as the bank has generated interest with Petitioners' money while this case has been in progress, and therefore would not be disadvantaged if it were required to now respond with interest.

The propriety of such an award is further evident if it is considered that such damages would be available under the applicable state law. Utah Code Annotated §61-1-22 (1953) provides that a plaintiff may recover "interest at 6% per year from the date of payment, costs and reasonable attorneys fees." Damages in Federal Court should at least comprehend damages available under comparable provisions of state law. Significantly, the Utah statute also mentions attorneys fees, which we have previously urged be awarded. See Brief of Petitioner, page 55. The Court's opinion is also silent on that point.

The opinion should be amended to award these additional items of damages, or at least leave the question open for the trial court.

## CONCLUSION

Petitioners do not seek rehearing on all aspects of the opinion. The findings that the government is not liable, and

that the terminated Utes are not entitled to a pro-rata distribution of the minerals, are findings with which AUC disagrees, but does not challenge.

Damages, and the "authorized representative" question, are those with which rehearing is requested. The former should be corrected without formal argument, for they represent simple oversights. The latter should be scheduled for briefing and argument concerning the social implications of the opinion — questions which have not been disposed of or briefed in depth to date.

The seating of two new justices, plus the absence of the Chief Justice during oral arguments and the dissent of Mr. Justice Douglas on the authorized representative question, are circumstances suggesting the propriety of rehearing. The query of Mr. Justice Marshall during oral argument concerning these very matters suggests that the issue is an important one of concern to the members of the Court. The care which is already evident in six months of efforts in resolving the inherently complex issues presented further suggest that rehearing on these limited aspects of the case would be appropriate.

Respectfully submitted,

/s/ Parker M. Nielson
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*Attorney for Petitioners*

## CERTIFICATE OF COUNSEL

As counsel for the Petitioners, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not to delay, and is filed in accordance with the provisions of Rule 58(1).

/s/ Parker M. Nielson
Parker M. Nielson
*Attorney for Petitioners*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1331~~ 70-78

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, ET AL.,
*Petitioners,*

v.

UNITED STATES OF AMERICA

ANITA REYOS, ET AL.,
*Petitioners,*

v.

FIRST SECURITY BANK OF UTAH, N.A.,
UNITED STATES OF AMERICA, ET AL.,
*Respondents.*

## MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., AS AMICUS CURIAE

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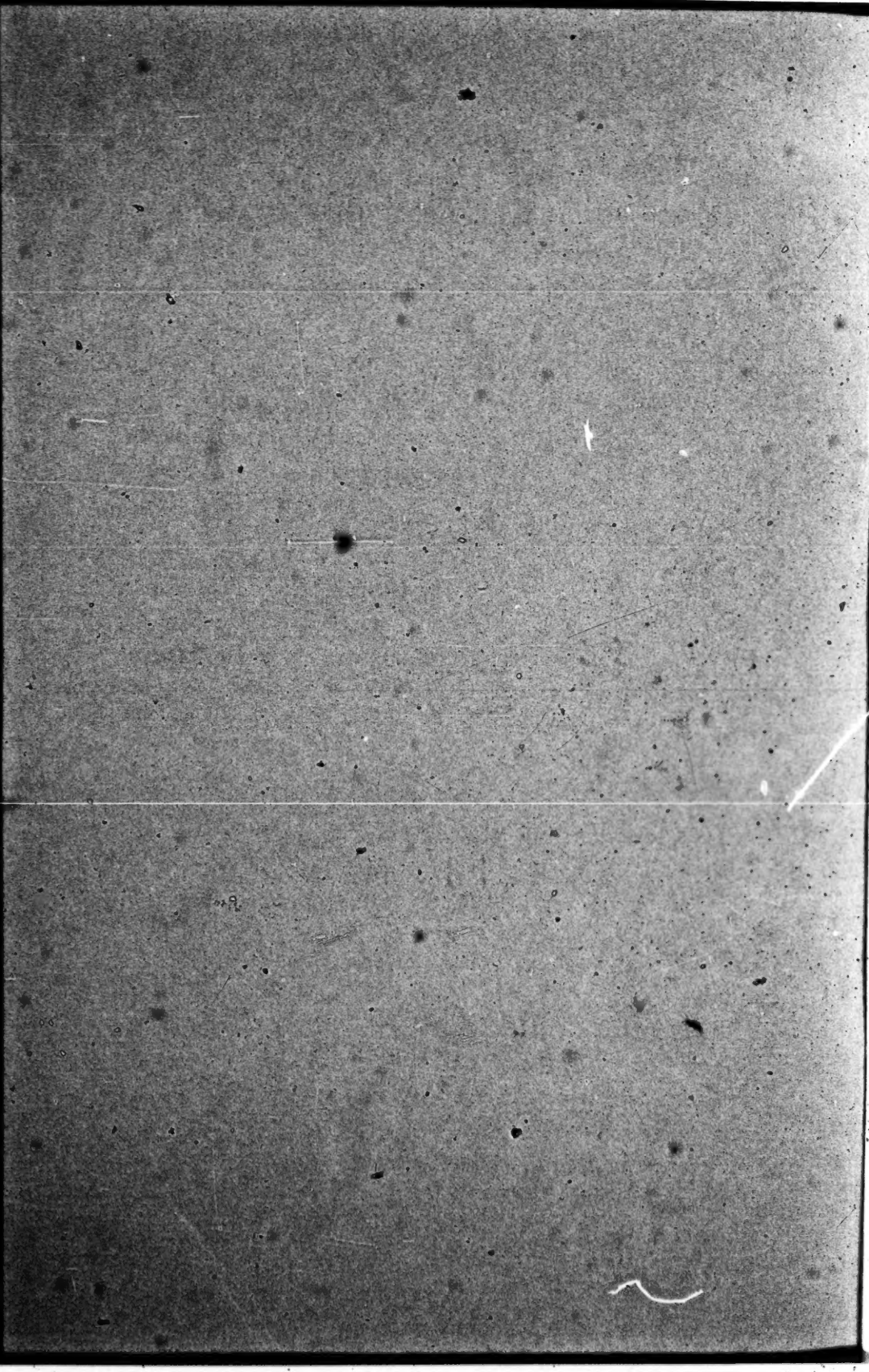

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 1331

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, ET AL.,

*Petitioners,*

v.

UNITED STATES OF AMERICA

ANITA REYOS, ET AL.,

*Petitioners,*

v.

FIRST SECURITY BANK OF UTAH, N.A.,
UNITED STATES OF AMERICA, ET AL.,

*Respondents.*

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Association on American Indian Affairs, Inc., respectfully moves the Court pursuant to Rule 42(3) for leave to file the attached brief *amicus curiae* in the above-captioned cases. The petitioners and respondent United States have consented in writing to the filing of this brief. Respondent First Security Bank of Utah, N.A., has refused to consent to the filing of the brief, and the individual respondents have not answered the letters of counsel for the Association seeking their consent.

The Association on American Indian Affairs is a non-profit membership corporation, organized under the laws of the State of New York for the purpose of protecting the

rights and improving the welfare of American Indians. The largest Indian-interest organization in the country, the Association's membership of 50,000 is made up of both Indians and non-Indians, and is nationwide in scope. Over the years, the Association frequently has participated in leading cases involving issues of Indian law before the Federal and State courts, including the filing of *amicus curiae* briefs with this Court in *Puyallup Tribe v. Department of Game of the State of Washington*, 391 U.S. 392 (1968), and *Warren Trading Post Company v. Arizona State Tax Comm.*, 380 U.S. 685 (1965).

This case presents a question of great and continuing concern to the Association and to Indians generally—the question of whether the United States still may owe a fiduciary responsibility to Indian people who have been made the subject of a so-called "termination act," such as Public Law 83-671 here under consideration. The position of the Association is that the Ute Termination Act preserved the trust obligations of the Federal Government to the mixed-blood as well as the full-blood members of the Ute Tribe with respect to the Tribe's mineral rights and other undivided tribal assets. In short, the Association urges that Congress under the Act has perpetuated the power of the Secretary of the Interior to control disposition of certain property in which the mixed-blood Utes have an undivided interest, and that with such power goes a duty of protecting the property for its intended Indian beneficiaries.

The United States in this case denies that it has any continuing special obligations towards the mixed-blood Utes, and thus takes a position directly adverse to the Association's. Petitioners, on the other hand, are interested not only in maximizing their money recovery, but also in gaining possession of the assets here involved, and cannot be expected fully to develop the argument that such assets remain under Federal trusteeship. The Association, by contrast, is concerned exclusively with the legal relationships between the parties under a termination statute, not with

specific liability, and, therefore, would be presenting a viewpoint not otherwise adequately represented before the Court.

For the foregoing reasons, the Association requests that its motion for leave to file the attached brief *amicus curiae* be granted.

Respectfully submitted,

ARTHUR LAZARUS, JR.
*General Counsel for*
*Amicus Curiae,*
Association on American
Indian Affairs, Inc.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

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No. 1331

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AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, ET AL.,
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## BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC. AS AMICUS CURIAE

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### STATEMENT

The Association on American Indian Affairs is a private, non-profit membership corporation devoted to protecting the rights and improving the welfare of American Indians. The Association is appearing in this case as *amicus curiae* because of its interest in the continuing relationship of the United States to the mixed-blood members of the Ute Indian Tribe under Public Law 83-671, the so-called Ute Termina-

tion Act.[1] The position of the Association is that the Act preserves the trust obligations of the United States to the mixed-blood as well as the full-blood members of the Ute Tribe with respect to the Tribe's mineral rights and other undivided tribal assets.

Before proceeding to an analysis of the specific provisions of the Ute Termination Act, it is relevant to note that the policy of termination has been an acknowledged failure.[2] The President, in his Message To Congress on Indian Affairs (H.R. Doc. No. 363, 91st Cong., 2d Sess. (1970)), recognized that the practical results of termination "have been clearly harmful" and that the economic and social condition of the affected Indians "has often been worse after termination than it was before." The facts in this case, as set forth in the District Court's detailed findings, provide more support than anyone would want for the President's statement. Fortunately, there is a basis in this case for ameliorating some of the harm suffered by the mixed-bloods as a result of this misguided legislation.

The Ute Termination Act was one of a series of termination acts enacted between 1954 and 1956 with respect to

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[1] Act of Aug. 27, 1954, 68 Stat. § 68, 25 U.S.C. § 677, *et seq.*

[2] The Government's Brief in Opposition p. 8 notes that "over the last decade the trend in Congress has been against following a policy of termination." The President in his Message To Congress on Indian Affairs discussed in the text described the policy of termination as "morally and legally unacceptable" and requested its repudiation by the Congress. The Message further rejected the premise of termination that the Federal Government can discontinue its trusteeship responsibility for Indian communities "whenever it sees fit" and recognized that "the special relationship" between Indians and the Federal Government is not "an act of generosity" but the "result instead of solemn obligations which have been entered into by the United States Government."

various Indian tribes.[3] While these statutes contain some common provisions, there also are differences reflecting differences in the status of the tribe or of the tribal property or other facts. Neither the members of the tribe nor the tribes themselves, nor the tribal property were dealt with by Congress as fungibles, and there is no such thing as a "Uniform Termination Act."

The Ute Termination Act in particular contains several provisions not found in other termination acts based on the fact that only the mixed-blood members of the Tribe were subject to termination and that certain assets of the Tribe continued under joint ownership. One of the defects in the decision of the Court of Appeals in this case is its failure to analyze the specific provisions of the Ute Termination Act in determining the impact of termination on undivided tribal property. The result is a sweeping application of the Act by the Court of Appeals which would do away with all restrictions on Federal supervision and leave the mixed-blood group without any remedy for the negligence of the agents of the Bureau of Indian Affairs with respect to tribal property still held in trust by the United States. For reasons which will be explained hereinafter, the Association believes that this harsh result may be avoided by a proper interpretation of the language of the Act.

## INTEREST OF AMICUS CURIAE

The interest of the Association on American Indian Affairs, Inc., as *amicus curiae* is set forth in the Association's motion for leave to file this brief *amicus*, to which motion this brief is annexed.

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[3]See for example, 25 U.S.C. § 891 *et seq.* (Menominee Tribe); 25 U.S.C. § 564 *et seq.* (Klamath Tribe; 25 U.S.C. § 691 *et seq.* (Western Oregon Indians); 25 U.S.C. § 721 *et seq.* (Alabama and Coushatta Indians of Texas); 25 U.S.C. § 741 *et seq.* (Paiute Indians of Utah); 25 U.S.C. § 791 *et seq.* (Wyandotte Tribe); 25 U.S.C. § 821 *et seq.* (Peoria Tribe); 25 U.S.C. § 841 *et seq.* (Ottawa Tribe); 25 U.S.C. § 931 *et seq.* (Catawba Tribe); 25 U.S.C. § 971 *et seq.* (Ponca Tribe).

## ARGUMENT

**THE UTE TERMINATION ACT DID NOT TERMINATE THE FEDERAL GOVERNMENT'S TRUST OBLIGATIONS WITH RESPECT TO THE UTE TRIBAL ASSETS NOT SUSCEPTIBLE OF DISTRIBUTION TO THE INDIVIDUAL MIXED-BLOOD MEMBERS OF THE TRIBE.**

### A. The Act Preserved the Federal Government's Trust Obligations to the Mixed-bloods With Respect to Undistributed Tribal Assets.

The position of the United States in this litigation is that any Federal obligation to the mixed-blood members of the Tribe was terminated by the Ute Termination Act and a Termination Proclamation issued by the Secretary of Interior on August 26, 1961 (26 Fed. Reg. 8042). The District Court rejected this as "too narrow a view of the Government's responsibility" and held that under the Act, "the emancipation of the mixed-bloods was only partial with reference to the transfer of their stock representing undivided interests in tribal lands and minerals." The Court of Appeals, agreeing with the Department of Justice, concluded that the Ute Termination Act had brought an "end" to the relationship between the mixed-bloods and the Government, and that the courts could not modify this termination by "the creation of some status lying between wardship and complete termination."

The inability of the Court of Appeals to find any source for a duty on the part of the Federal Government to the mixed-blood Utes after termination stems from the Court's failure to recognize that the Act preserves the Federal Government's trust responsibilities over the Tribe's undivided property. In other words, the Court below failed to distinguish between people to whom a special relationship was ended and property to which a special relationship continued.

In general, the Ute Termination Act provides for the division of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between "mixed" and "full" blooded members of the tribe, and for distribution of the assets of the mixed-blood group to the individual mixed-bloods.[4] A distinction is made throughout the Act, however, between tribal assets susceptible to equitable and practicable distribution; and tribal assets, such as mineral rights, which were not susceptible of such equitable and practicable distribution. No distribution of tribal assets not susceptible of equitable and practicable division was made to individual mixed-bloods under the Act.

Section 10 of the Act (25 U.S.C. § 677i) relates to the division of the tribal assets between the full-blood and mixed-blood groups. Under its terms, only the tribal assets "then susceptible to equitable and practicable distribution" were divided between the mixed-blood and full-blood groups. With regard to such tribal assets as are not susceptible to equitable and practicable distribution, section 10 states as follows:

> "All unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall be managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group, subject to such supervision by the Secretary as is otherwise required by law, and the net proceeds therefrom after deducting the costs chargeable to such management shall first be divided between the full-blood and mixed-blood groups in direct propor-

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[4] A "full-blood" member of the tribe was defined as a member of the tribe who possesses one-half degree of Ute Indian blood and a total of Indian blood in excess of one-half. (25 U.S.C. § 677a(b)) A member of the tribe who did not possess sufficient Indian or Ute Indian blood to fall within the "full-blood class" was defined as a "mixed-blood" member of the tribe. (25 U.S.C. § 677a(c))

> tion to the number of persons comprising the final membership roll of each group and without regard to the number of persons comprising each group at the time of the division of such proceeds."

Section 10 is the only provision of the Act dealing directly with the division of the tribal assets between the mixed-blood and full-blood members of the tribe. Consideration of its precise language is of critical importance to a proper application of the statute. This section provides unmistakeably different treatment for the tribal assets susceptible of distribution and the assets not susceptible of distribution. Tribal assets in this latter category, including the Tribe's mineral rights, are to be "managed" jointly by representatives of the mixed-blood and full-blood groups, "subject to such supervision by the Secretary as is otherwise required by law."[5] The "net proceeds" from such assets are to be "divided between the full-blood and mixed-blood groups in proportion to their number." The assets themselves are not divided between the two groups, the United States continues to hold title to the assets, and their management remains subject to supervision by the Secretary.

This distinction in section 10 of the Act between the assets susceptible of distribution and the assets not susceptible of distribution is maintained in other sections of the Act. For example, section 13 of the Act (25 U.S.C. § 677*l*), which deals generally with the distribution of assets to the individual members of the mixed-blood group, relates only to the assets covered by "the plan for the division of the assets between the two groups" (under section 10), and does not relate to the assets which were not included in such plan because they were not then susceptible to distribution.

Section 14 of the Act (25 U.S.C. § 677m), which in general authorizes the Secretary to impose a plan of distribution of the tribal assets to the individual mixed-blood members

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[5] This obviously refers to the law relating to Indian land. See e.g. 25 U.S.C. § 177 and 25 U.S.C. § 396a *et seq.*

of the tribe if no such distribution is accomplished by the tribe within seven years from August 27, 1954, similarly includes in its provisions only those assets "susceptible to equitable and practicable distribution," and gives the Secretary no authority to distribute to individual mixed-blood members assets not susceptible to equitable and practicable distribution.

Section 16 of the Act (25 U.S.C. § 677*o*), which in general provides for the termination of Federal supervision of the mixed-blood members and their property after distribution of the tribal assets to the individual mixed-bloods, likewise explicitly excepts from its provisions the "tribal property" not susceptible to equitable and practicable distribution, including all gas, oil and mineral rights of every kind. There is nothing in section 16 or in any other section of the Act providing for the termination of Federal supervision over such tribal property.

**B. The Court of Appeals Failed to Distinguish Between the Distributed and Undistributed Tribal Assets in Concluding That Termination Was Final Under the Act.**

The Court of Appeals and the District Court agreed that it was within the power of Congress to determine when and how termination should be effected. The District Court conclusion that emancipation was only "partial" and that a trust relationship continued with respect to the undivided mineral rights, and the Court of Appeals conclusion that termination was complete, were both based on the supposed intent of Congress.

In the view of the Association, it was the Court of Appeals and not the District Court which deviated from the statutory scheme. The fact that Congress determined to separate the tribe into full-blood and mixed-blood groups did not require the Congress to separate all of the tribal property into similar categories. Here the Congress decided that cer-

tain tribal assets would not be divided or distributed, but would simply be "jointly managed" by the two groups under the continuing supervision of the Secretary of Interior. The legislative reports state that "these undivided assets will continue to be owned and administered by the two groups." H.R. Rep. No. 2493, 83rd Cong., 2d Sess. (1954); S. Rept. No. 1632, 83rd Cong., 2d Sess. (1954). The Court of Appeals in its decision acknowledged that legal title to the "undistributed property . . . remained in the United States." Nowhere in the Act is there any provision for termination of the Secretary's trust obligations with respect to such tribal property. Nowhere in the Act is there any suggestion that the Secretary's trust obligations with respect to such property would be different for the mixed-blood and full-blood tribal beneficiaries. It is the Court of Appeals, therefore, and not the District Court, which inferred from the Act intentions which Congress did not express.

Much confusion has been caused in this case by the attempt to relate the Federal Government's continuing duty to the mixed-blood group to the provisions in section 15 of the Act (25 U.S.C. § 677n) requiring an offer to sell by each individual mixed-blood to the members of the Tribe before any sale of his interest to non-Indians.

Section 15 in its entirety is applicable only in the event a member of the mixed-blood group determined to dispose "of his interest in the tribal assets." As we have indicated, under the Act the undivided tribal assets were never individualized and, therefore, were not subject to alienation by the mixed-blood any more than by the full-blood members of the Tribe. No individual Indian may alienate his "inchoate" share in tribal property. U.S. Department of Interior, Federal Indian Law pp. 747-748 (1958 ed.) Section 15 may impose additional responsibilities on the United States, but the basic source of the Federal Government's duty to the mixed-bloods is the fact that under the Act, the Secretary of Interior continued to hold the undivided tribal assets in trust for the mixed-blood as well as the full-blood members of the Tribe.

The contention of the Court of Appeals and the Department of Justice that termination of the individual mixed-bloods served to terminate whatever trust obligations the Federal Government had with respect to the undivided tribal assets appears to be based not on the provisions of the Act, but on an assumption that the change in status of the mixed-bloods after termination cancelled the Federal Government's obligation to supervise the management of the tribal assets for the benefit of the mixed-blood group as well as the full-blood group.

This assumption is based on erroneous legal principles as well as on a misconstruction of the Act. There is no principle of law which requires the beneficiary of a trust, whether an individual or a group, to be under legal disability. "Obviously the property, real or personal, may be held in trust for a perfectly competent individual who is nobody's ward, and, on the other hand, perfect title to land or any other property may be vested in a lunatic or a minor whose every act is subject to a guardian's physical or legal control". U.S. Department of Interior, Federal Indian Law p. 564 (1958 ed.) The fact that the individual mixed-blood members of the Tribe were no longer wards of the Federal Government after termination has nothing to do with whether the Federal Government continues to hold the undivided tribal assets in trust for them.[6]

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[6]The Termination Proclmation issued on August 26, 1961 (26 Fed. Reg. 8042) under section 23 of the Act (25 U.S.C. § 677v) provides that effective midnight, August 27, 1961, "such individual [mixed-blood] shall not be entitled to any of the services performed for Indians because of his status as an Indian." Nothing in the Termination Proclamation or in section 23 of the Act purported to terminate the trust status of the undivided assets of the Tribe. Cf. *Menominee Tribe v. United States*, 391 U.S. 404 (1967). It is significant that Congress amended the act *following* the effective date of the Termination Proclamation to provide that the stock held by the mixed-bloods in the Ute Distribution Corporation could not be subject to mortgage, pledge, or similar process. Pub. Law 87-698, 76 Stat. 597, 25 U.S.C. § 677i. The purpose of this amendment was to "insure that the mixed-bloods' corporation stock may not be lost

There is no need to consider in this case whether Congress could have terminated this Federal trust despite retention of legal title in the undivided tribal assets. Such an intent is never to be "lightly" inferred. *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1967). It cannot be reasonably inferred from a statute under which there was no express termination of the Federal Government's duties to the mixed-blood or full-blood tribal groups with respect to the undistributed tribal assets; title to these assets continued in the United States in trust for their Indian beneficiaries, and even their management by the "authorized representatives" of the mixed-bloods and the full-bloods was "subject to such supervision by the Secretary as is otherwise required by law."

## CONCLUSION

By reason of the foregoing, the Association urges that the Court conclude that the Ute Termination Act did not terminate the Federal Government's trust obligations with respect to the tribal assets which were not distributed to the individual members of the mixed-blood members of the tribe, including specifically all gas, oil and mineral rights of every kind. Based on the findings of fact by the District Judge, we would urge also that the Court conclude that the Federal Government was negligent in the performance of its

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by being offered as security for minor debts. . . ." S. Rept. 2000, 87th Cong., 2d Sess. (1962); H. Rept. 2345, 87th Cong., 2d Sess. (1962). This amendment certainly suggests an exercise of continuing Federal supervision of the mixed-bloods after termination contrary to the Government's contention that termination was "final." Cf. *Crain v. First National Bank of Oregon*, 324 F.2d 532 (9th Cir. 1963).

duties as trustee of such tribal assets and that such negligence was the proximate cause of the damages suffered by the mixed-bloods in this case.

Respectfully submitted,

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